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JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956

No. 614

LEROY STANLEY, CHARLES WATTS WORRELL, JR., AND BEN JACKSON, JR., PETITIONERS,

versus

UNITED STATES OF AMERICA, RESPONDENT

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI AND FOR A STAY OF THE MANDATE

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MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND FOR A STAY OF THE MANDATE

The petitioners respectfully move for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case entered on February 25, 1957, and for a stay of the issuance of the mandate.

Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, this Court has, since

the filing of the petition for a writ of certiorari, filed its decision in *Paoli v. United States,* 77 S. Ct. 294, which is in conflict with the holding of the United States Court of Appeals for the Fourth Circuit in affirming the judgment of the District Court.

EDGAR L. MORRIS,
Columbia, S. C.,
Attorney for Petitioners.

PETITION

The petitioners pray that this Court grant rehearing of its order of February 25, 1957, denying the petition for writ of certiorari, 77 S. Ct. ...., and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit in the above-entitled case as prayed for in the petition filed December 7, 1956, herein.

REASONS FOR GRANTING REHEARING AND GRANTING A WRIT

1. Since the filing of the petition for a writ of certiorari, this Court has delivered its opinion in the case of *Paoli v. United States,* 77 S. Ct. 294, the decision therein is in conflict with the decision of the Court of Appeals for the Fourth Circuit herein which affirms the judgment of the District Court.

In the *Paoli case,* as in the present case, the question raised concerned the admission into evidence of the statement of a conspirator made long after the termination of the alleged conspiracy, when such statement strongly implicated the petitioners. The one difference in the *Paoli case* and the present case is that in the present case a statement made by a party not a member of the conspiracy but which strongly implicates the petitioners, was admitted into evidence.

It is not contended by the petitioners that the statement of the alleged co-conspirator was inadmissible but rather the trial Judge must, **at the time,** the statement is admitted, clearly stated to the jury that the statement is to be considered only in determining the guilt of the declarent and not that of the co-defendants to whom it refers, and that the failure of the trial Judge to do so, constitutes reversible error.

It is likewise not contended that the statement of the party, not a member of the alleged conspiracy, was inadmissible, but rather that it was admissible only to impeach the testimony of the declarent and that the trial Judge should, **at the time** the statement was admitted, clearly state to the jury that the same was not to be considered by them in determining the guilt of the petitioners but only to contradict and impeach the testimony of the declarent.

The prosecution, prior to the formal introduction of both statements into evidence, bared them to the jury by reading them, line for line, in cross examination of the declarents. Upon objection by counsel for petitioners, the trial Judge overruled the objections and permitted the prosecution to proceed with the reading of the implicating statements to the jury without instructions as to the use and limitations of the statements.

Certainly it cannot be said that the baring of the statements to the jury is not tantamount to admission of the same insofar as the jury is concerned, they have heard all of the statements and what they concerned. The statements were in fact formally admitted into evidence quite some time after the jury first heard them.

The Court of Appeals admitted in its decision that, "Undoubtedly, the jury was thus completely appraised of the comprehensive implications, by Vernell and Milton before the trial, of the appellants in the crime laid in the

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indictment" * * * and later, "It is true that when the statements were bared to the jury the Court **did not, on either occasion, give immediate explanation to the jury of the limited effect they could give the statement.**" (Emphasis supplied.)

Having admitted that the statements were not limited by proper instruction, the Court of Appeals then stated, "But we do not agree that this disclosure of the statement (without proper instructions to the jury) constituted reversible error."

Certainly this view of the Court of Appeals conflicts with the decision of this Court in the *Paoli case* which stated, "These declarations (*i. e.*, those admissible only as to the declarent) must be carefully and clearly limited by the Court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them."

The trial Court, when the co-conspirator's statement was formally offered into evidence late in the afternoon following the morning use of the statement for cross examination, said that the statement was in use as against the declarent only and also, after request by counsel for petitioners, charged the jury as to the use of the statement. Both instructions to the jury were short and in the light of the baring of the statement to the jury prior to its formal introduction, not very clear.

This Court stated in the *Paoli case* that, "Even then (after clear instructions to the jury at the time of the admission or baring of the statement) in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admissions of certain declarations and to whom they have been limited and in some instances for what purpose."

In the case at hand there were five defendants. There were two statements which were read to the jury. At the time they were read, the jury heard the trial Judge overrule the defense counsel's objections. Later the two statements were admitted into evidence and one of the statements was limited by a very general and short instruction to the jury.

The case at hand does not meet the test of requiring clear instructions which limit the effect of such statements.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that the issuance of the mandate be stayed and that the rehearing be granted and that, upon such rehearing a writ of certiorari issue to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

EDGAR L. MORRIS,
Columbia, S. C.,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

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